

because they themselves being superiors, could not give a precept of sasine for infesting themselves. The Lords having considered the desire of the bill, after a long debate went the way how they might be validly infest, as likewise two practices deduced, whereby the like was ordained in favours of a prebend of church lands, No 33. p. 6917, and in favours of the Earl Bothwell, who was a Lord of erection, which they found not to quadrate with this case; as likewise, that the said sisters might come to a valid infestment by granting bond, whereupon an adjudication might be recovered, and so infestment gotten in name of a third person; they at last did grant the desire of the bill, but ordained the precept to bear *salvo jure cuiuslibet*.

No 34.

*Gosford, MS. No 54. p. 19.*

1740. February 22. LORD BRAGO *against* The MAGISTRATES of BANFF.

No 35.

THE LORDS hesitated how far they could give warrant for a summary charge of horning against the Magistrates, to receive a singular successor for their vassal, upon a disposition and resignation *in favorem*, though such warrant be constantly granted to receive heirs and adjudgers in case of the Magistrates' refusal; and superseded till precedents should be looked for.

Nor was the point after all determined; for, upon the second application, containing such precedents as could be found, the fact appearing to be, that the Magistrates had actually received the resignation, but refused to allow the clerk to make out the instrument, upon a dispute that had arisen, Whether the *reddendo* should be conceived in terms of the more antient charters, or in terms of a later charter of adjudication? THE LORDS had no difficulty to find, that where the burgh had accepted of a resignation, there lay a summary remedy to oblige them to grant a charter; and granted warrant for letters of horning against the Magistrates, to receive the petitioner in terms of the antient investitures, which were particularly described in the interlocutor.

*Fol. Dic. v. 1. p. 471. Kilkerran, (SUPERIOR AND VASSAL.) No 3. p. 528.*

1742. June 23. WALLACE *against* DALRYMPLE.

WHERE an heritable bond bore an obligation to infest in an yearly annualrent out of particular lands, and forth of all other lands belonging to the granter, and lying within the shire of Ayr, as the same are enumerated in the granter's infestments, with a precept of sasine in the same precise terms, whereon the notary extended a sasine, in which he comprehended other lands as contained in the granter's infestments than those particularly mentioned in the heritable bond and precept, but without expressing any such infestments to have been produced to him; the LORDS " Found the sasine null as to all the lands

No 36.

No 36. other than those particularly expressed in the heritable bond and precept, which were the only warrants produced and published for taking thereof."

*Fol. Dic. v. 3. p. 317. Kilkerran, (SASINE.) No 4. p. 504.*

\* \* \* C. Home reports the same case :

In the process of mails and duties at Wallace of Cairnhill's instance, against Robert Dalrymple of Kelloch, and his tenants, compearance was made for Colonel Dalrymple, who produced an heritable bond, granted to him by Robert Dalrymple, with sasine thereon.

*Pleaded* for Cairnhill, That in so far as the heritable bond contained an obligation to infest the Colonel in his lands of Kelloch, he yielded preference to the Colonel ; but objected thereto, in so far as it contained an obligation to infest him ' forth of all and sundry the said Robert's other lands, of whatever ' name and designation the same be of, pertaining and belonging to him, and ' lying within the sheriffdom of Ayr, as the same are particularly enumerated and ' mentioned in the said Mr Robert Dalrymple's own, and his predecessors' and ' authors' rights and infestments of the same.' In support of the objection, it was *urged*, That the sasine was null, upon the head of uncertainty, as it did not appear from it, without looking into the common debtor's titles of the lands, whether the same was *rite* deduced, and as an *actus legitimus*, it ought to be complete in itself, without any dubiety ; nor can it ever be effectual in law, if it needs to be explained or supported by production of other deeds. What fatal effects such a sasine, if valid, would produce, with regard to our records, is obvious. It behoved to put all the lands therein mentioned *extra commercium*, when perhaps none of them belong to the common debtor. This, instead of clearing up to the lieges what lands are encumbered, and what are free, the only design of the records, tends to the direct contrary.

*Pleaded* for the Colonel, That his sasine was regularly taken in all the lands contained in his author's infestment, enumerated in the precise terms thereof ; and that, in consequence of a process and decret of poinding the ground, he had been in possession conform for near 20 years ; that, by our antient feudal customs, possession alone was sufficient for charter and sasine, and still it removes any suspicion that the Colonel was grasping at an infestment larger than his right ; the heritable bond was granted at London, where the debtor had not the rights of his lands, and it was impossible to carry in one's memory the names and descriptions of the particular small mailings ; Kelloch the principal is mentioned, and its pertinents, and reference is had to the debtor's infestment for the particular enumeration of the rest ; and, as soon as the bond was brought to Scotland, sasine was taken thereon, in terms of the debtor's infestment.

THE LORDS sustained the objection against Colonel Dalrymple's sasine as to all lands not specially named in the precept.

No 36.

*C. Home, No 198. p. 330.*

1753. August 3. TRUSTEES of Graham's Creditors *against* HYSLOP:

No 37.

THE LORDS were all of opinion, that a precept to give infestment in lands described in general to belong to the granter of the precept, is a sufficient warrant to give infestment in every particular tenement, which by production of the granter's infestment is vouched to come under the general description.

*Sel. Dec.*

\* \* \* This case is No 11. p. 49, *voce* ADJUDICATION.

1756. July 27. CAPTAIN JOHN GORDON of Park, Supplicant.

No 38.

SIR JAMES GORDON of Park, *anno* 1713, executed an entail of his estate in favour of himself, and after his decease to William Gordon his eldest son, and the heirs-male of his body; whom failing, to the heirs-male of Sir James's body, of the then present or any subsequent marriage, &c. Upon this entail he expedite a charter under the Great Seal; and in this charter, with the sasine following upon it, the prohibitory and irritant clauses were engrossed. After Sir James's death, his son, then Sir William, succeeded; and, by his attainder for high treason, the estate was surveyed in terms of the vesting act. Captain John Gordon, Sir James's second son, and next heir of entail, Sir William as yet having no children, entered a claim for the estate before the Court of Session, upon this medium, That the estate being entailed could not be forfeited for Sir William's treason. The cause being given for the claimant here, and appealed to the House of Lords, it was Adjudged and Declared, ' That Sir William Gordon; the person attainted, being, under the settlement made by his father Sir James, seised of an estate-tailzie in the barony and estate of Park; notwithstanding such tailzie was affected with prohibitive, irritant, and resolute clauses, the said barony and estate of Park did, by virtue of the statute of the 7th year of Queen Anne, cap. 21, become forfeited to the crown, by the said Sir William Gordon's attainder, during his life, and the continuance of such issue-male of his body as would have been inheritable to the said estate-tailzie in case he had not been attainted, &c.; and that, by virtue of the substitution to the heirs-male of the said Sir James Gordon's body of his then present marriage, the respondent, John Gordon, hath right to succeed to the said barony and estate of Park, after the death of the said Sir William Gordon, and failure of such issue-male of his body as aforesaid.'

The form of giving infestment to a remainder-man, or conditional institute in an entail where the former heirs are exhausted by attainder, is by the director of the chancery issuing a precept for that effect, if the lands hold of the crown; or by letters of horning against the superior if they hold of a subject.